No. 75

In the Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL TRADE COMMISSION, PETITIONER

v.

MOTION PICTURE ADVERTISING SERVICE COMPANY, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION

INDEX

CITATIONS

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OPINION BELOW

The opinion of the Court of Appeals (R.[1] 81) is reported at 194 F. 2d 633.

JURISDICTION

The judgment of the Court of Appeals was entered on February 21, 1952 (R. 86). The petition for a writ of certiorari was filed on May 20, 1952, and was granted on October 13,

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[1] We shall use the designation "R." in referring to the first volume of the record. References to the second and third volumes of the record will be designated, respectively, "R. vol. II" and "R. vol. III".

1952 (R. 89). The jurisdiction of this Court is conferred by 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Respondent is a producer and distributor of advertising motion picture films, and in the course of its business it has entered into many long-term contracts with motion picture exhibitors which give respondent the exclusive right to exhibit advertising films in the theatre or theatres covered by such contracts. The Federal Trade Commission found that these exclusive rights, when they run for a period of more than one year, unduly hinder and lessen competition and have an inherent tendency to monopoly. On review of the Commission's order directed against respondent's use of such contracts, the questions presented are:

1. Whether respondent's use of contracts which give it the exclusive right to exhibit advertising films for a period of more than one year constitutes an unfair method of competition within the meaning of Section 5 of the Federal Trade Commission Act.

2. Whether the Commission could validly determine that such contracts violate Section 5, when it had determined that contracts giving such exclusive exhibition rights for a period not greater than one year do not violate Section 5.

3. Whether such contracts made the exhibitors respondent's agents in the furnishing of exhibi-

tion service, and thus rendered the exclusive-dealing agreements permissible under Section 5.

4. Whether a prior order of the Commission issued against respondent is *res judicata* of the issues in the Commission's proceeding against respondent which is now under review.

STATUTE INVOLVED

Section 5 (a) of the Federal Trade Commission Act, 38 Stat. 717, 719; 52 Stat. 111, 15 U. S. C. 45, provides in part:

> Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

The present proceeding was initiated by a complaint issued by the Federal Trade Commission in May 1947 charging respondent with the use of unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act (R. 7-9). After hearings before an Examiner of the Commission, he filed a recommended decision which included a recommended order that respondent cease and desist from entering into contract with exhibitors which grant exclusive rights

to display advertising films for a period greater than one year (R. 38, 53). The parties waived exceptions to the Examiner's recommended decision and order, as well as the filing of briefs and oral argument before the Commission (R. 56). On October 17, 1950, the Commission filed its findings of fact, conclusion and order (R. 56–64).

Similar complaints had been filed against three other companies, Alexander Film Company, United Film Ad Service, Inc., and Reid H. Ray Film Industries, Inc. Comparable findings and conclusions and like orders were entered in each of the other three cases. See *In the Matter of Reid H. Ray Film Industries*, 47 F. T. C. 326; *In the Matter of Alexander Film Co.*, 47 F. T. C. 345; *In the Matter of United Film Aid Service, Inc.*, 47 F. T. C. 362. The Commission filed a single opinion in the four cases (R. 64), and Commissioner Mason filed a dissenting opinion (R. 67).[2]

We shall set forth the Commission's findings herein in some detail. Respondent, as we understand it, does not dispute the Commission's findings, except those relating to the effect upon competition of its exclusive-dealing contracts.

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[2] All four companies filed petitions to review the Commission's orders, but two, Alexander and Ray, have dismissed their review proceedings and the orders against them have become final by operation of Section 5 (g) of the Federal Trade Commission Act, 15 U. S. C. 45 (g). United's petition is pending in the Eighth Circuit, but, by stipulation of the parties, entered prior to judgment in the instant case, the judgment herein will also be determinative of United's case.

Respondent has been engaged since 1925 in the business of arranging for the showing of advertising films in motion picture theatres. This business involves making contracts with advertisers for the display, in designated theatres, of films which advertise the products or business of the advertiser; producing or procuring films suitable for this purpose; and making contracts with theatre owners and operators (referred to as exhibitors) under which respondent pays the exhibitor for the privilege of having the advertising films supplied by respondent appear on the screen of the exhibitor's theatre or theatres. (R. 57.)

Space available for the showing of advertising films is limited. Only about 60% of the country's motion picture theatres accept film advertising. In addition, the theatres which do accept such films limit their number because theatre patrons resent the showing of too much film advertising. Accordingly, the number of commercial films permitted to be shown varies from three to six, and their display consumes from 2% to 4% of the total screen time at each show.[3] (R. 60.)

Respondent serves the needs of, and provides for, three general types of film advertising. (1)

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[3] The advertising films used by respondent are only about 60 feet in length, and are known as playlets. They may be in color or in black and white, with live action or animated cartoons and with sound accompaniment. (R. 58.)

In the case of local advertisers, respondent uses films which advertise a particular kind of business, and attaches a trailer identifying the local advertiser with such business. Playlets of this kind, known as library film, can be repeatedly used in different localities and avoid the prohibitive cost of making a special film for each local advertiser. (2) In the case of manufacturer-dealer programs, employed when a manufacturer's product is distributed through a limited number of dealers, specific playlets are produced and their cost is usually borne by the manufacturer. Dealers who participate in the advertising program pay all or part of the charge for showing the films in theatres and are identified by trailers attached to the playlets. (3) So-called national advertising occurs when playlets are made to advertise a company's product which is sold through numerous outlets, and in this advertising the manufacturer bears the cost of making the playlets and the charge for showing the film. (R. 58.)

Respondent's contracts with advertisers provide for display of films weekly or bi-weekly, usually for a period of one year, with a different playlet for each week of the showing. Contracts for a one-year period are the standard practice, and respondent will not accept a contract from an advertiser which provides for advertising for a period of less than 13 weeks. (R. 59.)

Respondent's contracts with exhibitors are for various periods up to a maximum of five years, and the majority are for a one-year or two-year term (R. 58). About 25% are for the maximum five-year period (R. 58–59). Of 4,096 theatres with which respondent had screening agreements as of August 1, 1947, 2,493, or more than 60%, had an exclusive clause barring the exhibitor from displaying any advertising film not furnished by respondent (R. 60). The three other respondents before the Commission enter into like exclusive contracts. Alexander Film Company had exclusive contracts with 4,913 theatres, United Film Ad Service, Inc., with 1,562 theatres, and Reid H. Ray Film Industries, Inc., with 458 theatres (*ibid.*). Thus, these companies, plus respondent, had exclusive contracts with 9,426 theatres, or approximately 75% of the 12,676 theatres in the United States which display advertising films (R. 59–60).

Respondent is in substantial competition with other companies engaged in the business of distributing advertising films (R. 58). Respondent's exclusive contracts bar competitors from the screens of the theatres covered by these contracts and limit the outlets of its competitors in a field which in itself is limited (R. 60). This has had the effect of forcing some competitors to go out of business (*ibid.*). The injurious effects upon competition of respondent's exclusive contracts, and their inherent tendency to monopoly

have been materially increased by the exclusory effect of the like agreements made by the three other principal companies in the business (R. 60–61).

In many instances theatres prefer exclusive agreements because they give better control of screen advertising, eliminate uncertainty and extra bookkeeping, and prevent misunderstandings with local advertisers (R. 61.) Such agreements also permit negotiation of more satisfactory contracts with advertisers because the agreements assure use of the screens of particular theatres during the term of the advertiser's contract (*ibid.*).

When a distributor's contract with an exhibitor expires before completing the screen showing called for by the distributor's contracts with advertisers, the exhibitor customarily permits the screening to continue so as to complete the contracts with advertisers. In practice, the period of time covered by a distributor's contract with an exhibitor means the period of time in which the distributor may solicit contracts with advertisers rather than the period of time in which advertising films supplied by the distributor will be shown on the screens of the exhibitor's theatres. (R. 59.)

The Commission concluded that respondent's use of exclusive screening agreements which run for a period of more than one year constitutes "an unreasonable restraint and restriction of

competition," and that prohibition of such contracts is required in the public interest (R. 63). It concluded that the fact that such agreements may aid the respondent in building up its business is not controlling where, as in the circumstances under consideration, the agreements have the effect of unduly hindering, lessening and injuring competition (R. 62). The Commission also concluded that since advertising contracts for a period of one year have become "standard practice in the trade," since the definite availability of future screen space facilitates the securing of advertising contracts, and since film advertising space in theatres is limited, exclusive screening agreements for periods not in excess of one year are not an undue restraint upon competition (*ibid.*).

The Commission's order directs respondent to cease and desist from (1) entering into any contracts giving it the exclusive privilege of exhibiting advertising films for more than one year, or (2) continuing in effect any exclusive screening provision in existing contracts when the unexpired term of such provision extends more than one year beyond the date of service of the Commission's order (R. 63-64).[4]

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[4] The Commission subsequently denied respondent's motion (R. 71) to modify the cease and desist order by eliminating the prohibition on continuation of exclusive-dealing agreements whose unexpired term extended for more than one year (R. 77-79).

The court of appeals, in setting aside the Commission's order, held that the proof failed to establish that respondent's exclusive-dealing agreements were "unfair" methods of competition or that their prohibition would be "in the public interest" (R. 85).[5] The court further held that the Federal Trade Commission Act did not enlarge or change "the definition of unfair methods of competition as laid down by the courts prior to its enactment" (*ibid.*). It stated (R. 85–86):

> Let the business of petitioner be legitimate; let its method of conducting it be open, honest, without substantial monopolistic tendency, and free from deceptive acts and practices; all of which is presumed to be true, and which presumption is not rebutted by the evidence: then no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition in commerce in violation of the Federal Trade Commission Act.

The court concluded that, with available time and space for screen advertising severely limited, and with the nature of the business such that prospective screen advertisers require an assured outlet "for a reasonable time," respondent's

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[5] The court indicated that it was of the opinion that increasing the amount of screen advertising is not in the public interest, but the court stated that it was not dismissing the proceeding upon this ground (R. 85).

of exclusive contracts for periods longer than one year "was not unfair or unreasonable, but was rendered desirable and necessary by good-business acumen and ordinarily prudent management" (R. 86).

The court also appears to have rested its decision upon the further ground that the contract between respondent and the exhibitor is a "contract of agency" covered by the decision of this Court in *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568 (R. 85).[6]

SPECIFICATION OF ERRORS TO BE URGED

The court of appeals erred:

(1) In holding that the Commission had erred in determining that respondent's use of exclusive screening contracts extending beyond the period of one year constitutes an unfair method of competition.

(2) In substituting its own judgment for that of the Commission as to whether respondent's practices are "unfair" methods of competition.

(3) In holding that a practice is not an unfair method of competition if it is "rendered desirable and necessary by good-business acumen and ordinarily prudent management."

[6] The court did not pass upon respondent's contention that a prior Commission proceeding was *res judicata* of the instant case (R. 82). This contention was presented to, and rejected by, the Commission in a separate opinion issued early in the proceedings (R. 14–16).

(4) In holding that the contract between respondent and the exhibitor is a "contract of agency" governed by the holding in *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. at 643.

(5) In holding that the common-law concept of unfair competition fixes the scope of the prohibition of "unfair methods of competition" in the Federal Trade Commission Act.

(6) In setting aside the Commission's cease and desist order and dismissing its complaint.

SUMMARY OF ARGUMENT

I

It is well settled that the authority given the Federal Trade Commission by Section 5 of the Act to suppress "unfair methods of competition" empowers the Commission to prohibit "all conduct violative of the Sherman Act" and also many practices which "do not assume the proportions of Sherman Act violations." *Federal Trade Commission* v. *Cement Institute, Inc.*, 333 U. S. 683, 694. Congress vested in the Commission "adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages" (*id.* p. 693). Moreover, the Commission's power is not limited to practices which were regarded as unfair competition at common law. *Federal*

Trade Commission v. *Keppel & Bro.*, 291 U. S. 304, 310–311.

Here the Commission has found that respondent's long-term exclusive dealing contracts unreasonably restrain competition and tend to monopoly. That finding is supported by a showing that respondent, in the 27 states in which it operates, has exclusive contracts with almost 40% of the theatres exhibiting advertising films, and that the four major companies, against all of whom the Commission entered cease and desist orders, together had exclusive contracts with 75% of all available cutlets throughout the United States. In view of the highly limited number of opportunities for displaying advertising films it is obvious that such a situation enables the established companies "collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market." *Standard Oil Co.* v. *United States*, 337 U. S. 293, 309.

Exclusive dealing agreements have repeatedly been held unlawful under both the Sherman Act and the Clayton Act. Whether or not these agreements are prohibited by either of those acts it was clearly competent for the Commission to conclude that their effect in the situation here disclosed was unreasonably to restrain competition and to tend to monopoly and that they should, therefore, be prohibited as unfair methods of competition.

II

The fact that the Commission did not prohibit all exclusive dealing contracts is no argument against the validity of the more limited order which it did enter. It is unnecessary to consider whether the Commission might have prohibited all of respondent's exclusive dealing contracts as illegal *per se* under the Sherman Act. If such contracts are illegal *per se* then the Commission's order prohibiting certain exclusive contracts is clearly valid. If, on the other hand, illegality turns on the circumstances there was reasonable basis for the line which the Commission drew between contracts which exclude competitors for a year and those which exclude competitors for a longer period.

III

The exclusive dealing agreements were not exempt from Section 5 of the Federal Trade Commission Act as contracts of agency. Those agreements have none of the attributes of an agency; the theatre owner, like other owners of advertising media, is simply selling space to an advertiser. But in any event nothing in *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, on which the court below relied, or in any other decision of this Court warrants a suggestion that business practices which happen to be cast in the form of agency are thereby immunized from the

power of the Commission under Section 5 to suppress unfair methods of competition.

IV

Respondent's contention, not passed on by the court below, that a prior Commission proceeding is *res judicata* of the issues herein is plainly without merit. The prior proceeding was based on a conspiracy; moreover it covered a different period of time. Compare *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 152.

ARGUMENT

I

RESPONDENT'S CONTRACTS WITH EXHIBITORS GIVING EXCLUSIVE RIGHTS FOR PERIODS GREATER THAN ONE YEAR CONSTITUTE UNFAIR METHODS OF COMPETITION WHICH THE FEDERAL TRADE COMMISSION IS AUTHORIZED TO PROHIBIT

It is settled that the "unfair methods of competition" which Section 5 of the Federal Trade Commission Act authorizes the Federal Trade Commission to suppress include "violations of the Sherman Act," and that the Commission has jurisdiction to prohibit as an unfair method of competition any conduct which violates the Sherman Act. *Federal Trade Commission* v. *Cement Institute, Inc.*, 333 U. S. 683, 690–692, and cases cited. Moreover, the Trade Commission Act, while it embraces "all conduct violative of the Sherman Act," covers also many practices which "do not assume the proportions of Sherman Act

violations." *Id.*, p. 694. It was the purpose of Congress in enacting the statute to vest in the Commission and the courts "adequate powers to hit at every trade practice, then existing or thereafter contrived, which restrained competition or might lead to such restraint if not stopped in its incipient stages." *Id.*, p. 693. If a practice "runs counter to the public policy declared in the Sherman and Clayton Acts," it comes within the authority given to the Commission of Section 5 of the Trade Commission Act. *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 463.

In a variety of situations, this Court has sustained the power of the Commission to prohibit as unfair methods of competition practices which tend to eliminate competitors, monopolize trade, or restrict opportunity to deal in a free market. Practices of this kind which have been held to constitute "unfair methods of competition" include boycott of competitors (*Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457), use of a multiple basing point pricing system (*Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683), retail price maintenance (*Federal Trade Commission* v. *Beech-Nut Packing Company*, 257 U. S. 441), and price fixing (*Federal Trade Commission* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52).

It is well settled, moreover, that the Act is not confined, as the court below thought, to what

the courts had, prior to its enactment, defined as unfair methods of competition (R. 85). In *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, 310–312, this Court carefully reviewed the Act's legislative history, and held that Congress adopted the "broader and more flexible" phase "unfair methods of competition" in place of the words "unfair competition" because the meaning which the common law had given to the latter words was deemed "too narrow."[7] In that case, this Court also emphasized the weight to which the Commission's expert judgment, based upon adequate and properly supported findings, is entitled (291 U. S. at 314).

The Commission's finding that respondent's exclusive contracts unreasonably restrain competition and tend to monopoly is thus the necessary starting point in considering the validity of the Commission's order. If there is support in the evidence for this finding, and if, under this finding, respondent's practices violated the Sherman Act, or, at the least, came "within the inhibition of the policies declared by the Sherman

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[7] In that case the Court said (p. 312) that Congress advisedly adopted a phrase which does not "admit of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'" Subsequently the Court said that Congress intended Section 5 of the Trade Commission Act to be a "flexible concept with evolving content." *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, 353.

Act" (*Fashion Originators' Guild* case, *supra*, at p. 465), the Commission acted well within the ambit of its authority when it determined that respondent's long-term exclusive contracts constitute unfair methods of competition.

We submit that certain central, undisputed facts provide ample support for the Commission's finding as to restraint of trade and tendency to monopoly. Respondent is a distributor of advertising films and the number of outlets for such films, whether distributed by respondent or its competitors, is severely limited. This, therefore, is not a situation in which the availability to competing manufacturers of a potentially unlimited number of other dealers may lead to the conclusion that the manufacturer's exclusive dealing practices do not violate the Sherman Act.[8]

In the 27 states and the District of Columbia in which respondent distributes advertising films, only 6,260 theatres exhibit such films and respondent has exclusive contracts with 2,493 of these theatres, or 39.5% (R. 59–60). Necessarily, in particular states a much higher percentage of the available theatres is engrossed by these contracts, just as in other states the percentage engrossed is much below that of the whole area in which respondent is marketing film advertis-

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[8] See *United States* v. *J. I. Case Co.*, 101 F. Supp. 856 (D. Minn.).

ing. In fact, the evidence before the Commission showed that in three states respondent's exclusive contracts bound 70% to 74.5% of the available theatres whereas in two states such contracts bound less than 5% of the available theatres,[9] and the Commission might properly appraise the restrictive effects of respondent's exclusive contracts upon the basis of the areas in which the potentialities for restraint and monoply had been most fully realized. *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 226; *Standard Oil Co.* v. *United States,* 337 U. S. 293, note 5 at pp. 299–300.

Moreover, the evidence indicates that the theatres with which exclusive agreements were made were usually the most desirable ones. As respondent's president testified, "Roughly, 75 percent of the volume of business that we do is on screens that will not screen ads for other people" (R. Vol. II, 95). And he further stated that respondent always sought "to secure exclusive agreements

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[9] Exhibit 1, as admitted in evidence in the Commission proceeding, shows the following:

State (1)	Theatres which screen ads (2)	Theatres having exclusive contracts with respondent (3)	Percentage which (3) is of (2) (4)
New Hampshire	51	38	74.5
Tennessee	248	183	73.8
Massachusetts	170	119	70
Arizona	61	1	1.6
New Mexico	79	3	3.8

with theatres that might be termed highly salable to advertisers" while in the case of less salable theatres "we would take an exclusive agreement if they offered it to us" (R. Vol. II, 90; see also *id.* 83).

The Commission found that the effect of respondent's exclusive contracts in limiting the outlets for advertising films was increased by the like exclusive contracts made by the three other principal companies in the business (R. 60–61). The four major concerns, together, foreclosed to other companies 75% of all available outlets throughout the United States (R. 60), and, as indicated above, undoubtedly the foreclosure of the more desirable available outlets ran considerably higher. When, as here, the four dominant concerns in the industry pursue the same restrictive practices, the limitations on competition which result are compounded. In *Standard Oil Co.* v. *United States,* 337 U. S. 293, 309, this Court observed that, since all the major suppliers had been using requirement contracts, it would not be far fetched to infer that the effect has been to enable the established suppliers "collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market."

Because of the uniformity in the practices of the four dominant concerns, the Commission proceeded against, and entered like cease and desist orders against, each of the four (*supra;* p. 4),

recognizing that only thus could relief against the resulting restraints on competition be achieved.

Respondent's exclusive contracts suppress, during their life, all opportunity to compete for the patronage of the contracting theatres. In many areas these contracts close against competition well over a majority of all available outlets. In addition, many of the remaining outlets are closed to competition because of the exclusive contracts made by the three other major companies in the business. These undisputed facts fully support the Commission's finding of restraint on competition and tendency to monopoly, and the statute makes conclusive findings of the Commission which are "supported by evidence" (15 U. S. C. 45 (c)).

In *International Salt Co.* v. *United States*, 332 U. S. 392, the district court had entered summary judgment against the defendant both under Section 1 of the Sherman Act and Section 3 of the Clayton Act. It was established by pleadings or admissions that the defendant had entered into many leases of two patented machines relating to utilization of salt in industrial processes, and that the leases required the lessees to purchase from the defendant all salt consumed in the leased machines. This was a restraint of trade for which defendant's patents afforded no immunity from the antitrust laws, but the defendant contended that summary judgment was

erroneous because there were disputed issues of fact as to whether the restraint imposed by the tying provision was unreasonable within the Sherman Act or substantially lessened competition or tended to create a monopoly within the Clayton Act. This Court held, however, that the tendency of the agreements to accomplishment of monopoly was "obvious", and that the admitted facts "left no genuine issue." 332 U. S. at 396. *A fortiori*, in the present case where the question is whether there is evidentiary support for an administrative finding, the findings as to restraint on competition and tendency to monopoly plainly withstand challenge. See also *Federal Trade Commission* v. *Morton Salt Co.,* 334 U. S. 37, 50.

The restraint on competition and tendency to monopoly which result from respondent's long-term exclusive contracts bring its conduct within the prohibitions of the Sherman Act. Agreements which limit the outlets through which a product may be sold in interstate commerce "have been condemned time and again as violative of the [Sherman] Act." *United States* v. *Yellow Cab Co.,* 332 U. S. 218, 226. See also *Associated Press, Inc.* v. *United States,* 326 U. S. 1, 18–19 and cases cited. Exclusive dealing agreements have been repeatedly held unlawful both under the Sherman Act and under the Clayton Act.[10]

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[10] Sherman Act: *International Salt Co.* v. *United States,* 332 U. S. 392, 396; *Vitagraph, Inc.* v. *Perelman,* 95 F. 2d 142 (C. A. 3), certiorari denied, 305 U. S. 610; *United States* v.

The court below appears to have ignored the necessary effect of respondent's exclusive dealing contracts in restricting access of competitors to outlets for advertising films, and thereby restraining competition and tending to monopoly. In doing so it appears to have substituted its judgment for that of the Commission, and to have given conclusive weight to its view that respondent's practices were "rendered desirable and necessary by good-business acumen and ordinarily prudent management." (R. 86). As it said, "no means that are just, truthful, reasonable, and requisite to the successful operation of the business, are unfair methods of competition" in violation of the Act (*ibid*).

To the extent that this conclusion rests upon a rejection, substantially without discussion,[11] of

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Great Lakes Towing Co., 208 Fed. 733 (N.,D. Ohio), appeal dismissed, 245 U. S. 675; *United States* v. *Eastman Kodak Co.*, 226 Fed. 62 (W. D. N. Y.), appeal dismissed, 255 U. S. 578; *United States* v. *Pullman Co.*, 50 F. Supp. 123 (E. D. Pa.), affirmed, 330 U. S. 806; *United States* v. *Standard Oil Co.*, 78 F. Supp. 850 (S. D. Calif.), affirmed on other points, 337 U. S. 293; *United States* v. *American Can Co.*, 87 F. Supp. 18, 31-32 (N. D. Calif.).

Clayton Act: *Standard Oil Co.* v. *United States*, 337 U. S. 293; *Richfield Oil Corp.* v. *United States*, 343 U. S. 922; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346; *Butterick Co.* v. *Federal Trade Commission*, 4 F. 2d 910 (C. A. 2), certiorari denied, 267 U. S. 602; *Carter Carburetor Corp.* v. *Federal Trade Commission*, 112 F. 2d 722 (C. A. 8).

[11] The court spoke of a presumption that respondent's business was "without substantial monopolistic tendency", which it said "is not rebutted by the evidence" (R. 85-86).

the Commission's findings as to the effect on competition, it cannot be sustained for reasons already indicated. To the extent that it reflects a view that practices which restrain competition must nevertheless be permitted if rendered desirable by good business acumen it is likewise untenable. Conduct which is within the ban of the Sherman Act and the policies of that Act, and which the Commission may therefore prohibit as an unfair method of competition, is not given sanction by reason of the fact that it may be "beneficial" to respondent in building up its business or by reason of the fact that many theatres "prefer" exclusive agreements. *Fashion Originators' Guild, Inc.,* v. *Federal Trade Commission,* 312 U. S. 457, 467–468. In that case, which involved a Commission order directed against the use of unfair methods of competition, this Court held that since the practices which the Commission had prohibited fell within the prohibitions of the Sherman and Clayton Acts, they would be given no sanction by a showing that they "benefited" the manufacturers engaging in the practices, their employees, the retailers to whom they sold, and consumers, by protecting each group against the "devastating evils" incident to the pirating of original designs for ladies' garments.

The absence of a finding by the Commission that respondent specifically intended to restrain or monopolize trade is likewise immaterial. A

finding of specific intent to restrain trade or to build a monopoly is not essential to a finding of violation of the antitrust laws. "It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. * * * Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act." *United States* v. *Griffith,* 334 U. S. 100, 105.

Up to the present point, we have referred to violation of the Sherman Act and contravention of the policies which that Act expresses as providing full basis for the Commission's determination that respondent's long-term exclusive-dealing contracts were unfair methods of competition within the meaning of the Trade Commission Act. Aside from this, Section 3 of the Clayton Act reflects a strong public policy against exclusive-dealing arrangements. That section flatly prohibits such agreements by buyers of goods where the effect may be to substantially lessen competition or to create a monopoly in any line of commerce. *Standard Oil Co.* v. *United States,* 337 U. S. 293; *Richfield Oil Corp.* v. *United States,* 343 U. S. 922. Although the contracts in the instant case are presumably not within Section 3 since the exclusive commitment is by the *seller* of screen space (the theatre) rather than by the buyer (respondent), the effect on competition is

the same in either situation. The basic public policy against exclusive-dealing arrangements which adversely affect competition, as declared by Section 3 of the Clayton Act, brings respondent's exclusive contracts within the Commission's authority to prohibit unfair methods of competition.

II.

THE COMMISSION'S PROHIBITION OF CONTRACTS GIVING EXCLUSIVE SCREENING RIGHTS FOR A PERIOD LONGER THAN ONE YEAR IS NOT INVALIDATED BY ITS FAILURE TO BAN ONE-YEAR EXCLUSIVE CONTRACTS

The court below seems to have been of the opinion that, because the Commission did not rule that respondent's exclusive screening contracts are *per se* illegal and because it concluded that the one-year exclusive contracts made by respondent did not violate the Federal Trade Commission Act, its order against exclusive contracts of a longer term must fall (R. 83).

It is not necessary in this case to pass upon the question of whether exclusive-dealing contracts applicable to an important segment of interstate commerce are *per se* illegal under the Sherman Act. See *International Salt Co.* v. *United States*, 332 U. S. 392, 396.[12] But see *United States* v.

[12] This case, as stated previously, involved exclusive requirements contracts incorporated in leases licensing the use of patented machinery.

Columbia Steel Co., 334 U. S. 495, 522–523. The fact that in the present case the Commission's determination and order are not premised upon the view that exclusive screening contracts are *per se* illegal is certainly not a ground for vitiating its determination and order. The Commission's application of a test of illegality less drastic than the doctrine of illegality *per se* gives respondent no ground for complaint.

The Commission, upon a balancing of the trade-restraining effects of respondent's exclusive screening contracts against the business considerations advanced in justification of such contracts, concluded that in the case of one-year contracts the latter considerations sufficiently outweighed the former so as not to call for prohibitory action by the Commission, but reached the opposite conclusion as to longer term contracts. ~~We~~ submit that this conclusion is not vulnerable on the basis of either logic or the proof.

If respondent's exclusive contracts with exhibitors are to be deemed *per se* illegal under the Sherman Act, the Commission's order must stand. If their illegality under that Act is appropriately determined by a balancing of all relevant considerations, there necessarily must be a drawing of the line and, under the facts, there is ample justification for viewing the duration of the contracts as fixing the dividing line between conduct

which is permissible and that which is not permissible under the Federal Trade Commission Act.

Contracts with advertisers customarily provide for film advertising to appear for a period of a year, and the advertiser desires assurance that his advertising will appear for this period in the theatres designated in the contract. One-year exclusive screening contracts provide this assurance, but there is no need in this connection for exclusive screening contracts of a longer term. While the date on which respondent enters into a screening contract may not coincide with the dates on which it enters into contracts with advertisers calling for a year of film advertising, the Commission's order, as interpreted in its opinion (R. 67), permits respondent to incorporate in any one-year exclusive screening contract a provision authorizing it to complete advertising contracts which had been entered into during the life of the screening contract. During such completion, any balance of screening space on the theatres covered by respondent's contract would be available for film advertising supplied by whoever then had a contract for exclusive screening rights or, if no such contract was made, would be available to any and all comers.

The Commission's conclusion that exclusive screening contracts running for more than one year are not "necessary to the performance of its [respondent's] contracts with advertisers" (R. 62) has the support of the testimony of respond-

ent's district sales manager, that over 50% of its exclusive contracts are for only one year and that exclusive agreements for such period are "sufficient" under existing conditions (R. Vol. III, 99). The court's apparent finding also flies in the face of respondent's admission, made in its motion for modification of the Commission's order, that respondent could comply with the prohibitions of the order against future exclusive screening contracts of more than a year's duration "without great financial loss or burden" (R. 73). Furthermore, two of the other three principal companies in the business, one of which (Alexander Film Co.) had much the largest number of exclusive screening contracts (R. 60), have permitted orders, imposing the same prohibitions as the order entered against respondent, to become final (*supra*, note 2, p. 4).

III

THE EXCLUSIVE DEALING AGREEMENTS WERE NOT EXEMPT FROM THE FEDERAL TRADE COMMISSION ACT AS "AGENCY" AGREEMENTS

Apparently as an alternative basis of decision, the Court of Appeals held that the screening contracts with movie theatres were contracts of agency and that for that reason its decision was "governed" by *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, which required that the Commission's order be set aside. We submit that neither the court's premise nor

its conclusion is valid; these contracts are not contracts of agency, and even if they were, that fact would not preclude the Commission from acting as it did.

The situation involved in the *Curtis* case was almost the exact opposite of that here presented. There the Commission and this Court had before them an arrangement by which a publishing company had employed "agents" for the purpose, *inter alia,* of training, instructing and supervising a staff of school boys in accordance with the publishing company's plan and subject to its direction and control. The agent was to supply school boys and other dealers with magazines with which the company supplied the agent, all on a consignment basis. No contention was made that this was not a genuine agency; the contention was simply that as to those agents who had formerly been independent dealers the effect of the plan was to curtail competition (260 U. S. at 581), and that as to such agents the plan violated Section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act.

Here, on the other hand, there is no suggestion that any of the parties to the screening agreements regarded them as creating a relationship of agency.[13] On the contrary, the theatre owners

[13] Respondent's standard agreements (which were in evidence before the Commission, Commission Exhibits 21 and 22) nowhere use language of agency. Some of its agreements (Comm. Exs. 27-W and 27-Z-1) use language inconsistent with agency.

regarded themselves as renting out space, just as they had formerly done when advertisements were lettered on a drop curtain that was lowered between performances (R. Vol. II, 77–78). As one theatre owner stated " I am like the man with a bill-board, I have so much space to sell and I want so much money for it" (R. Vol. II, 221; see also *id.* 184). Similarly, respondent and other distributors of advertising films considered, not that they were hiring exhibitors to perform a service for them, but that they were paying the exhibitors for "the privilege of running screen advertising on his screen" (R. Vol. II, 71; see *id.* 83).[14] There is nothing in the record to suggest that respondent sought to instruct, control or supervise the exhibitor in the way in which he displayed film, other than to require that it be displayed at a time when the theatre was dark and the audience seated. On the other hand, the record is full of evidence that exhibitors were concerned to control the number and quality of the films shown, both because of a sense of responsibility to their audience and because it was typically to the exhibitor that the merchant addressed any

[14] For a number of years the Interstate Circuit, in Texas had its own advertising department. As the head of that department testified, "instead of renewing the contract [with the Alexander Film Co.] * * * we decided * * * to do our own selling and take all the profits that would otherwise have gone to a film advertising company" (R. Vol. II, 187).

complaint with respect to the advertising shown, as, for example, in the case of contemporaneous advertising of two concerns engaged in the same kind of business. See e. g. R. Vol. II, 125, 129, 140, 161, 223, 238–239.

Thus the relationship has none of the ordinary attributes of agency. The exhibitor does not act subject to respondent's control (Restatement of Agency, Secs. 1, 14); the shoe is on the other foot. The exhibitor has no occasion or power to bind respondent to a contract or subject him to tort liability (*id.*, Sec. 12). And the exhibitor certainly does not act as a fiduciary (*id.*, Sec. 13).[15] The court below seems to have rested its conclusion that the relationship was one of agency on the fact that the exhibitor rendered a personal service; he projected the film. But obviously the exhibitor is not being paid for projecting film, any more than an advertiser pays a newspaper for the service of setting his ad in type, or a billboard company for the service of keeping the board properly lighted. To suggest that such incidental performance of service results in making the exhibitor the agent of the distributor of film advertising is, indeed, to suggest that the tail wags the dog.

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[15] The suggestion that the relationship is a fiduciary one is most clearly exposed in the case of a non-exclusive contract, where the exhibitor may refuse to show advertising films of X because his theatre is filled that week with films of X's competitor Y.

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But even if it could be assumed that the relationship was one of agency that would not help respondent. In the *Curtis* case the Court referred to the fact of agency as disposing of charges under Section 3 of the Clayton Act, prohibiting exclusive dealing in a lease or a sale or contract for sale (260 U. S. at 581). Its opinion contains no suggestion that the mere fact that agency is involved takes a practice outside the scope of Section 5 of the Federal Trade Commission Act prohibiting "unfair methods of competition." Subsequent decisions have emphasized that in considering the application of the Sherman Act "the result must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade" (*United States* v. *Masonite Corporation*, 316 U. S. 265, 280). Like considerations must apply under Section 5 of the Federal Trade Commission Act. That section contains no exemption for agency contracts; it authorizes the prohibition of unfair methods of competition no matter what the legal form in which these unfair methods may be cast. If, as we have shown earlier in Point I, the Commission could properly find that because of their practical economic effect on competition the long-term exclusive contracts which it has prohibited are an unfair method of competition, its power to prohibit them under Section 5 of the Federal

Trade Commission Act is not restricted by the fact that the court below, rightly or wrongly, described them as contracts of agency.

IV

THE ORDER WHICH THE COMMISSION ISSUED IN 1943 AGAINST RESPONDENT AND OTHERS IS NOT *RES JUDICATA* OF THE ISSUES IN THE PRESENT PROCEEDING

The court below did not pass upon respondent's contention that a prior order of the Commission issued against respondent and others was *res judicata* of the issues in the instant proceeding, but the question is solely one of law, is clearly without merit, and should now be disposed of so that a proceeding which has been pending more than five years may be brought to final termination. Compare *Kiefer-Stewart Co.* v. *Seagram & Sons,* 340 U. S. 211, 214; *Cardillo* v. *Liberty Mutual Insurance Co.,* 330 U. S. 469, 473–474.

In March 1942 the Commission issued a complaint charging that respondent and other named companies engaged in the distribution of advertising films had entered into "understandings, agreements, combinations, and conspiracies" among themselves to suppress competition in the distribution of such films, in violation of Section 5 of the Federal Trade Commission Act. *In the Matter of Screen Broadcast Corporation, et al.,* 36 F. T. C. 957, 962. One of the charges made was that "pursuant to" said understandings, etc., the respondent distributors had entered into long-

term contracts with exhibitors for the exclusive privilege of displaying advertising films in the exhibitors' theatres (*id.*, 962–963). After a hearing, the Commission in June 1943 made findings sustaining these charges, concluded that the practices set forth in its findings constitute unfair methods of competition within the meaning of the Federal Trade Commission Act, and entered a cease and desist order against continuing or carrying out "any planned common course of action, agreement, understanding, combination, or conspiracy" to do certain specified things, including the making of contracts with exhibitors for the exclusive privilege of exhibiting advertising films in the exhibitors' theatres (*id.* 970, 973, 974).

The issue in the instant case is whether respondent's long-term exclusive screening contracts violate the Trade Commission Act irrespective of agreement or conspiracy with others to engage in this practice.[16] This is an issue wholly outside the charges made and determined in the 1942 proceeding. Since the claim in the present action was not determined in the earlier action the determination there made is not *res judicata* of the issue presented in the later proceeding. And there equally is no basis for estoppel by judgment since recovery in the second action does

[16] The nature of the issue is, of course, not altered by reason of the simultaneous institution by the Commission of like proceedings against other companies in the business.

not depend upon a question "the same as" one previously litigated and determined. *Tait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 623; *Southern Pacific R. R. Co.* v. *United States*, 168 U. S. 1, 50; *Cromwell* v. *County of Sac*, 94 U. S. 351, 353. The Commission was, therefore, clearly right when it said in its opinion on the plea of *res judicata* (R. 15–16):

> In the first proceeding the gravamen of the offense charged was the combination and conspiracy to do and the doing of certain acts pursuant to such combination and conspiracy. The acts charged as a violation of law in the present proceeding are the individual acts of respondent not charged as having been done pursuant to any agreement or understanding with others. The difference between the issues in the two proceedings is therefore apparent.

The first proceeding covered the period up to March 1942 and the second a period up to May 1947. Where the determination of a claim, such as use of unfair methods of competition, depends upon the conclusion to be drawn from numerous relevant facts which easily may vary from one period to another, determination of the legal effect of one set of facts is not an adjudication of the legal effect of similar but nevertheless different facts existing in another period. In such a situation, which likewise involved Section 5 of the Trade Commission Act, this Court sum-

marily rejected as "without merit" the contention that the earlier proceeding was *res judicata* of the later. *Federal Trade Commission* v. *Raladam Co.*, 316 U. S. 149, 152. See also *Engineer's Club of Phila.* v. *United States*, 42 F. Supp. 182, 187–188 (Ct. Cls.); *Snyder* v. *Commissioner*, 73 F. 2d 5, 6 (C. A. 3), affirmed on other points, 295 U. S. 134.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed, with directions to enter a judgment affirming and enforcing the order of the Commission.

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